FILED
APR 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA
and NGPL-TRAILBLAZER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF UNION PACIFIC RESOURCES COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Accepting that defendant possessed the power to raise prices to supra-competitive levels and exclude competitors for a period of six years, and that, as a result of its predatory conduct, it conferred a substantial share (54%) of a highly concentrated market on an affiliate, the court of appeals below nevertheless held that, as a matter of law, defendant could not unlawfully attempt to monopolize under Section 2 of the Sherman Act because it could not confer a 70-80% market share on its affiliate and because its ability to exercise monopoly power was not permanent.

Under the circumstances, the questions presented are:

1. Whether, as a matter of law, a party cannot under any circumstances possess monopoly power in a relevant market, unless it has at least a 70% to 80% share of that market.

2. Whether, as a matter of law, there cannot be a dangerous probability that a party will achieve monopoly power in a relevant market, if, for any reason, its share of the market cannot reach 70-80%.

3. Whether, as a matter of law, a party cannot unlawfully attempt to monopolize a relevant market if its ability to raise prices and exclude competitors is not permanent.

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BRIEF OF UNION PACIFIC RESOURCES COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Union Pacific Resources Company (U.P. Resources) is a wholly-owned subsidiary of Union Pacific Corporation and is the corporate successor of Champlin Petroleum Company (Champlin). U.P. Resources is, and for many years has been, engaged in the business of the production and sale of natural gas in various states, including the Overthrust region of Wyoming. In order to be

sold, U.P. Resources' Overthrust gas must be transported substantial distances over interstate pipelines to metropolitan areas where it is consumed.

As a producer and seller of gas that must be shipped over pipelines, *amicus* has a direct interest in issues that affect the legal rights of producers, shippers and purchasers of natural gas. In particular, *amicus* is vitally concerned with the ability of any pipeline in a highly concentrated market (characteristic of many natural gas producing regions which are served by only a few pipelines) to exercise market power in a way that precludes the use of low cost means of transportation in favor of high cost means of transportation.

Amicus was directly and substantially injured as a result of anticompetitive acts of respondent Natural Gas Pipeline Company (NGPL) as found by the jury and the District Court below. Natural gas produced by *amicus* (Champlin) was diverted by NGPL from the lower-cost pipeline of petitioner Colorado Interstate Gas Company (CIG) to much higher-cost pipelines in which NGPL had a dominant financial interest.[1]

STATEMENT

Amicus generally agrees with Petitioner's statement. However, it wishes to emphasize that NGPL's exclusionary conduct did, in fact, have an actual and substantial anticompetitive impact on producers and sellers whose natural gas was shipped over the least efficient, highest cost pipeline.

1. During the gas shortage of the 1970's, reserves of natural gas were discovered in southwest Wyoming by

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[1] In addition, as the jury, the District Court and the Court of Appeals found, NGPL tortiously interfered with Champlin's extremely valuable long term contract to supply natural gas to CIG. (*See* Pet. App. 4a, 14a-16a, 31a, 58a-63a.) *Amicus* has notified NGPL of its intention to file suit asserting antitrust and tortious interference claims against NGPL.

amicus and others. Since the volume of this gas far exceeded the amount that could be consumed in the local markets in Utah, Wyoming and Colorado, it had to be transported long distances for interconnection with other pipelines serving major market areas in the midwest and elsewhere.

There were few options for the long distance transportation of this newly discovered gas. One option was by CIG's-pipeline that runs from southern Wyoming through Colorado and south to the Oklahoma-Texas panhandle where it interconnects with other pipelines, including NGPL's trunkline to the Midwest.

In the late 1970s, NGPL proposed the construction of a new pipeline that would directly connect the newly discovered southwest Wyoming gas fields to NGPL's trunkline. This pipeline, in which NGPL held the largest financial and capacity interests, was known as the Trailblazer System. From southwest Wyoming, it ran parallel to CIG's line until Cheyenne where it continued east to connect with NGPL's trunkline at Beatrice, Nebraska. This new line provided an alternative means for the long-distance transportation of Wyoming natural gas.[2]

Because the Trailblazer System was a new pipeline, built at a high cost, it had to charge transportation rates that were much higher than those of its competitors, including CIG. Not surprisingly, as demand for natural gas slackened in 1982 and 1983, very little gas flowed over the Trailblazer System.

With its dominant financial interest in Trailblazer imperiled by the system's inability to compete with CIG's

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[2] Although FERC had doubts about the need for this additional pipeline capacity, it approved construction of the Trailblazer System, but with an unusual rate structure in which rates increased with the volume of gas transported. Under this arrangement, parties with financial interests in this system were severely penalized if throughput fell below projections.

lower-cost line, NGPL embarked upon a course of predatory conduct to exclude CIG from competing for long distance transportation of Wyoming natural gas, including that produced by Champlin. Historically, NGPL purchased substantial quantities of gas from CIG under long-term contracts. In July 1983, NGPL abruptly refused to purchase gas from CIG.[3] As a result of NGPL's actions, CIG shut-in and refused to buy any gas from Champlin in breach of its contractual obligations. NGPL then purchased the gas directly from Champlin at a lower price so that it could transport it on the higher cost Trailblazer System.

Under the terms of the service agreement in effect between CIG and NGPL, however, CIG was obligated to continue to reserve space in its pipeline for the full volume of gas subject to its agreement for NGPL. As a result, CIG was unable to use this capacity to provide firm transportation service for other customers. To make sure that CIG was prevented from transporting gas for other customers, NGPL nominated but refused to buy large volumes of gas from CIG, tying up transportation capacity on CIG's line. NGPL even increased its nominations without purchasing any gas. At other times, NGPL made periodic gas purchases from CIG that were timed in a fashion to interfere with CIG's efforts to transport gas for others on an interruptible basis.

2. CIG sued NGPL, alleging, among other things, that NGPL attempted to monopolize the market for the long distance transportation of natural gas from Wyoming. After an eight week trial, the jury found that NGPL had, in fact, violated Section 2 of the Sherman Act by attempting to monopolize the long-distance transportation of natural gas. The district court denied NGPL's motion for judgment notwithstanding the verdict and en-

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[3] Although NGPL's stated reason for doing so was that it had a surplus of gas, NGPL proceeded to replace much of the CIG gas with other, higher cost gas.

tered a substantial judgment in favor of CIG on its antitrust claim. Pet. App. at 29a-88a.

3. On appeal, the Tenth Circuit reversed the antitrust judgment on grounds not raised by NGPL. *Id.* at 1a-28a. The court of appeals accepted that NGPL's conduct was "predatory," *id.* at 23a and "reprehensible," *id.* at 19a, and that as a result of this conduct NGPL was able to (i) increase Trailblazer's market share from 41% to 54%, *id.* at 21a, 23a, (ii) impose an enormous increase in the effective price for the transportation of natural gas by requiring it to be shipped over the higher cost Trailblazer System, *id.* at 27a, and (iii) effectively exclude CIG from competing for this business for a period of six years. *Id.*

Nevertheless, the court concluded that this conduct—as well as its impact on buyers, sellers and shippers of natural gas—did not implicate the concerns of the antitrust laws because CIG could not, as a matter of law, establish that there was a dangerous probability that the Trailblazer System would ever achieve monopoly power. *Id.* at 20a. The court based this conclusion on two factors. First, although it recognized that the "Supreme Court has refused to specify a minimal market share necessary to indicate a defendant has monopoly power," the court of appeals held that NGPL lacked the ability to increase Trailblazer's market share to the 70-80% minimum which the court found to be necessary, as a matter of law, to confer monopoly power. *Id.* at 21a & n.18.

Second, the court of appeals concluded that Section 2 of the Sherman Act was concerned only with the permanent or persistent exercise of monopoly power. *Id.* at 25a and 26a, n.22. Since Trailblazer's ability to exercise market power was limited to the six year period during which NGPL had a contractual right to tie-up CIG's capacity, the Court found that Section 2 did not apply to NGPL's "reprehensible" conduct. *Id.* at 27a.

REASONS WHY THE PETITION SHOULD BE GRANTED

The petition should be granted and this Court should review the decision below. The holding of the court of appeals conflicts with decisions of this Court and those of other courts of appeal on the critical issue of the extent to which unilateral conduct by a single firm with significant market share—and demonstrated monopoly power—is prohibited by Section 2 of the Sherman Act. By adopting an inflexible mathematical standard for the minimum share required by Section 2 (70-80%), the decision of the court of appeals adds to the existing confusion among the lower courts which, in the absence of guidance from this Court, have developed a variety of inconsistent tests for determining when monopoly power may be found to exist. Not surprisingly, these differing tests have led to widely conflicting rulings. This case presents an ideal opportunity for the Court to resolve these conflicts and to provide much needed direction to the lower courts.

1. The Tenth Circuit's requirement of a minimum market share necessary to attain monopoly power (70-80%) misconceives the role of market shares in determining monopoly power for purposes of Section 2. Section 2 condemns the unlawful possession, acquisition or attempted acquisition of monopoly power. Monopoly power is "the power to control prices or exclude competition." *United States v. E.I. duPont deNemours & Co.*, 351 U.S. 377, 391 (1956). The Court has held in plain terms that monopoly power can be proven in one of two ways: (i) as in the case below, by direct evidence of the actual exercise of control over prices or the actual exclusion of competitors, *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *see also FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986) (in Section 1 case, proof of anticompetitive effects eliminates need to demonstrate market share to show adverse

effect on competition), or, (ii) in the absence of such direct evidence, by indirect or circumstantial evidence of the defendant's ability to control price and exclude competitors.

By holding that a certain minimum market share must be established to prove monopoly power, the court of appeals ignored the fundamental fact that Section 2 prohibits the exercise of monopoly power and not simply the possession of a specified market share. It also rendered irrelevant the best and most direct evidence of monopoly power, *viz.*, the actual exercise of the power to exclude competitors and raise prices. Unfortunately, the Tenth Circuit is not alone in this error as most courts of appeal have utilized minimum market share criteria of one type or another. *See* pp. 8-9, *infra.*

Reliance on minimum market share tests for proof of monopoly power produces the sort of anomalous results seen below: a company that was "helpless to compete" on the basis of price and quality but that was able to exclude competitors from the market for a six year period during which it imposed supra-competitive prices was deemed legally incapable of attempting to monopolize because its market share could never reach the minimum level the lower court thought necessary to demonstrate monopoly power.

The Court should grant the petition to affirm that Section 2 condemns any wrongful exercise of "monopoly power" and not just the exercise of such power by a defendant with a certain share of the market.

2. In circumstances where there is no conclusive direct evidence of the actual exercise of monopoly power, lower courts need guidance from the Court on the significance to attach to market shares in determining whether a defendant possesses, or is capable of possessing, monopoly power.

Recognizing that market share is only one factor to be considered in assessing market power, the Court has long condemned mechanical reliance on market share tests for determining market power.

> We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of a percentage command of a market varies with the setting in which that factor is placed.

United States v. Columbia Steel Co., 334 U.S. 495, 527-28 (1948) (footnote omitted). *See also Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986) ("[m]arket share is just a way of estimating power, which is the ultimate consideration. When there are better ways to estimate market power, the court should use them."); *In re General Foods Corp.*, 103 F.T.C. 204, 357 (1984) (use of market share as a gauge of market power "has been increasingly questioned on both theoretical and empirical grounds"). The panel's arbitrary 70-80% minimum market share threshold for proof of monopoly power constitutes just the sort of "[b]lind reliance upon market share, divorced from commercial reality" that may "give a misleading picture of a firm's actual ability to control prices or exclude competition," *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), that this Court has criticized.

The lower courts and federal antitrust enforcement agencies have encountered great difficulty in determining the significance of market share as an indication of monopoly power. The decision below adds to and deepens the existing confusion. In the Tenth Circuit, a finding of monopoly power now requires proof of a 70-80% market share. In the Seventh Circuit, a 60% market share is required, *Holleb & Co. v. Produce Terminal Cold Storage*

Co., 532 F.2d 29, 33 (7th Cir. 1976). In both the Second and Ninth Circuits, less than a 50% share may suffice, *Hayden Publishing Co. v. Cox Broadcasting Corp.*, 730 F.2d 64, 68-69 & n.7 (2d Cir. 1984); *Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc.*, 651 F.2d 122, 130 (2d Cir.) (instruction precluding monopoly power with market share less than 50% is erroneous), *cert. denied*, 454 U.S. 968 (1981); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975) (upholding jury verdict of monopolization with market shares as lower in 45%), *cert. denied*, 425 U.S. 959 (1976), while in the Fifth Circuit, a 50% market share may or may not suffice. *Compare Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, n.2 (5th Cir. 1969); *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1352 & n.18, 1356-57 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1989) *with Yoder Bros. Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1367 n.14 (5th Cir. 1976) (no "rigid rule" that firm with less than 50% market share lacks monopoly power), *cert. denied*, 429 U.S. 1094 (1977). Still other courts have concluded that, under the appropriate circumstances, firms may possess monopoly power with as little as 25% of the market, *see Energex Lighting Industries v. North American Phillips Lighting Corp.*, 656 F. Supp. 914, 921 (S.D.N.Y. 1987), while the Department of Justice has indicated that a firm with 35% of the market may be able to exercise anticompetitive market power. U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations, § 3.2 ("Monopolization") at 9 & n.52 (November 10, 1988) ("In general, the Department will not be concerned with unilateral conduct if a firm has a market share of less than 35%.").

The Supreme Court should review the holding below to clarify the difficult but essential question of the proper

role of market share analysis in determining market power. As others have noted:

> In challenges to unilateral behavior, the defendant's market share can indicate its market power. However, the connection between market share and market power is far from clear.

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 518.3 at 448 (1989 Supp.).

3. The Tenth Circuit's holding that Section 2 is concerned only with the exercise of permanent or persistent monopoly power also deserves review by this Court. The panel's decision that the antitrust laws do not care about the exercise of monopoly power—no matter how predatory, or long lived—so long as "the market will return to the status quo at a predetermined date," App. at 27a & n. 24, is at odds with the fundamental purpose of Section 2.

There is no basis in logic or in either the text or the legislative history of the Sherman Act to confine the broad prohibition of Section 2 to the permanent exercise of monopoly power. When, as here, a party has the power to exclude competitors and impose supracompetitive prices, Section 2 applies, regardless of the duration of that power, just as it does when a monopolist engages in predatory conduct that can only delay but not ultimately exclude entry by competitors[4] or when a patent owner insists on payment of royalties for any period beyond the terms of the patent. *Brulotte v. Thys Co.*, 379 U.S. 29, 31 (1964).

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[4] *See e.g.* U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations, Case 13 (November 10, 1988) (anticompetitive use of Section 337 of 1930 Tariff Act by monopolistic producer to exclude (temporarily) entry by foreign competitor by sham filing of petition with U.S. International Trade Commission).

The panel's decision that Section 2 is concerned only with the permanent exercise of monopoly power is also flatly inconsistent with the decisions of other courts of appeal which have recognized that monopoly power is prohibited by Section 2 whenever it exists. *See e.g. Dimmitt Agri Indus. v. CPC Int'l, Inc.*, 679 F.2d 516, 531, 533-34 (5th Cir. 1982) (sufficient evidence of attempt to monopolize even though competition limited defendant's long-term control over prices), *cert. denied*, 460 U.S. 1082 (1983); *Peto v. Howell*, 101 F.2d 353, 356 (7th Cir. 1939) ("it is not to be conceived that a monopoly . . . for one day is any less a violation of the law than a monopoly . . . for thirty days or for a year.").

While there may be instances in which a party may legitimately acquire significant but temporary market power, considerable confusion exists among the lower courts and the antitrust enforcement agencies over the duration of market power that is the proper concern of the antitrust laws. The court of appeals below found that a six year period of unbridled market power was simply "transitory" and of no concern to the antitrust laws,[5] App. at 28a, while other courts have found that the exercise of such power for as little as one day or one month was prohibited. *Supra.* The FTC has concluded that insulation from competitive entry for 5 years permits the exercise of impermissible market power, *In re Weyerhauser Co.*, [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,315 at 23,382 (1985) (merger), while the Department of Justice relies on a two-year time period in determining whether new entry is likely to erode the market power of a dominant firm. *See* U.S.

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[5] In contrast, the Justice Department regards a one-year price increase as "non-transitory" for purposes of defining a relevant market in which a hypothetical monopolist may exercise market power by raising prices without causing a shift in consumer demand. U.S. Department of Justice, Revised Merger Guidelines § 2.12 (June 14, 1984).

Department of Justice, Revised Merger Guidelines § 3.3 (June 14, 1984).

The Court should review the decision below to resolve the important issue of whether, and under what circumstances, the unilateral exercise of market power that is not permanent is subject to the prohibition of Section 2 of the Sherman Act. As one commentator has stated in connection with the measurement of market power, "[a]ntitrust law needs to decide what time period concerns it." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 518.3 at 451 (1989 Supp.).

CONCLUSION

For the reasons stated, the Court should grant the petition and review the decision of the court of appeals.

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